UNITED NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 542

Case No. 560: PENNACCHI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Ahmed Osman, Vice-President, presiding; Mr. Ioan Voicu; Mr. Luis de Posadas Montero;

Whereas, on 10 April 1990, Luisa Pennacchi, a former staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, filed an application which did not fulfil the formal requirements of article 7 of the Rules of the Tribunal;

Whereas the Applicant, after making the necessary corrections, again filed her application on 9 July 1990;

Whereas the application contained the following pleas:

"II. PLEAS

...

MAY IT PLEASE the Administrative Tribunal of the United Nations

As to the form:

To declare the present application receivable;

As to the merits:

a. As a preliminary measure

To hear Mrs. F. PATARD and Mr. Pierre Henry MININI as witnesses;

b. Substantively

- To declare null and void the decision of 26 October 1988 to suspend the Applicant without pay for one month, as confirmed by the decision of 8 January 1990;

c. Having done that

- To order UNICEF to pay to the Applicant fair compensation for moral injury;

- To order UNICEF to pay to the Applicant, as costs, fair compensation."

Whereas the Respondent filed his answer on 15 February 1991;

Whereas, on 31 May 1991, the Applicant filed written observations in which she requested inter alia that consideration of her case be adjourned pending a decision by the Respondent on another appeal filed by her concerning termination of her permanent appointment for abolition of post;

Whereas the facts in the case are as follows:

The Applicant, who held a permanent appointment with the UNICEF Office at Geneva as an Administrative Services Clerk at the G-3 level, was involved on 25 and 26 April 1988 in incidents which the Joint Disciplinary Committee of the United Nations Office at Geneva has described as follows:

"5. On 25 April 1988, an argument over cutting and photocopying of documents took place between Mrs. Pennacchi and Mrs. Chantal Tissot, another UNICEF staff member.

6. Later on 25 April 1988, Mrs. Pennacchi reported to her supervisor, Mr. A. Mitzmacher, the argument she had with Mrs. Tissot that day and complained about Mrs. Tissot's impolite attitude towards her.

7. The following day, 26 April 1988, another incident took place between Mrs. Pennacchi and Mrs. Chantal Tissot, involving alleged physical violence by Mrs. Pennacchi.

8. On 27 April 1988, Mrs. Tissot submitted her written statement concerning the incidents she had with Mrs. Pennacchi on 25 and 26 April 1988 (...)."

On 27 April 1988 the Director of the UNICEF Office at Geneva decided to suspend the Applicant from duty with full pay pending investigation under staff rule 110.4. On 28 April 1988 the Applicant was informed accordingly. On 23 June 1988 the Director of the UNICEF Office at Geneva submitted the Applicant's case to the Joint Disciplinary Committee of the United Nations Office at Geneva.

The Joint Disciplinary Committee, having heard the representative of the Administration, the Applicant, Mrs. Tissot, an eye-witness and the supervisor of the Applicant on 26 August 1988, submitted its report on 12 September 1988. The conclusions and recommendations of the Committee read as follows:

"IV. CONCLUSIONS AND RECOMMENDATIONS

A. Range of disciplinary measures considered

68. After considering the above, the Committee reviewed all possible disciplinary measures.

69. The Committee agreed that dismissal was too excessive a penalty in view of the predominance of attenuating factors. The Committee next considered suspension without pay or demotion and concluded that none of these two measures would be justified for the same reasons given above.

70. Moreover, the Committee took into account the fact that Mrs. Pennacchi was on suspension (even with full pay) since four months and has therefore already been effectively penalized morally and professionally by being deprived of work. Her credibility at work was, and still is, impaired as a result of this suspension.

B. Recommendations

71. In view of the foregoing, the Committee recommends:

(a) that a written censure be addressed to Mrs. Pennacchi for misconduct under staff rule 110.3(b),

(b) that Mrs. Tissot be made aware, by way of reprimand, of the fact that her unfounded remarks and lack of consideration with regard to an ailing colleague have initiated and escalated the incident."

On 26 October 1988 the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had taken the following decision in her case:

"The Secretary-General has examined your case in the light of the Committee's report and taken note of its finding that you slapped and pushed a colleague and used excessive language. The Committee found, moreover, that you were not under physical threat and therefore there was no excuse for you to resort to physical violence. Your actions were obviously incompatible with your responsibility and conduct befitting your status as an international civil servant under staff regulation 1.4. It has therefore been decided to suspend you from service without pay for one month with effect from the date of this decision, as a disciplinary measure under staff rule 110.3(b). In view of the seriousness of the matter, the Secretary-General may be obliged, in case of any further act of violence on your part, to impose on you the most severe disciplinary measure under staff regulation 10.2, paragraph 2."

On 6 December 1988 the Applicant lodged an appeal with the Joint Appeals Board at Geneva, which submitted its report on 11 December 1989. The Board's conclusions and recommendation read as follows:

"Conclusions and Recommendation

41. In view of the foregoing, the Panel unanimously concludes that:

(a) the Appellant's misconduct has been properly established by the JDC [Joint Disciplinary Committee];

(b) the Appellant was accorded due process before a decision was reached to suspend her without pay for one month as a disciplinary measure under staff rule 110.3(b);

(c) the decision to suspend the Appellant for one month as a disciplinary measure under staff rule 110.3(b) was a proper exercise of the Secretary-General's discretionary power, and that the contested decision was not tainted by prejudice or any other extraneous factor.

42. Accordingly, the Panel makes no recommendation in support of the appeal."

On 8 January 1990 the Officer-in-Charge of the Department of Administration and Management advised the Applicant that the Secretary-General, having re-examined her case in the light of the Board's report, had decided to maintain the contested decision. On 9 July 1990 the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant was denied due process. Her right to be heard was disregarded in many respects. At no stage of the proceedings was she confronted with Mrs. Tissot. The other persons involved were heard in her absence. Statements favourable to her were not taken.

2. While the decision to suspend the Applicant from duty was taken with undue haste, the investigation was deliberately slow in order to exert pressure on the Applicant so that she would resign her post.

3. The contested decision was disproportionate and, moreover, followed a suspension from duty of several months. No effort at conciliation was made. The Respondent disregarded attenuating factors, thereby abusing his discretion in disciplinary matters.

Whereas the Respondent's principal contentions are:

1. The United Nations Charter and the Staff Regulations oblige the Secretary-General to select and retain staff of the highest standards of efficiency, competence and integrity and, therefore, he has the responsibility of determining definitively whether a staff member meets those standards.

2. The decision to suspend the Applicant without pay for one month was properly taken after the Applicant had been accorded due process.

3. The sanction to be imposed for misconduct is a matter within the discretion of the Secretary-General.

The Tribunal, having deliberated from 16 October to 7 November 1991, now pronounces the following judgement:

I. The Applicant has asked for the hearing of two witnesses. The Tribunal considers that the material presented is sufficient and that the hearing of additional testimony is unnecessary.

II. The Applicant has also requested that the present case be adjourned pending a decision by the Respondent on another appeal filed by the Applicant concerning termination of her permanent appointment for abolition of post. Since the present case is ready for adjudication and the second appeal referred to by the Applicant has not yet been brought before the Tribunal, the Tribunal sees no justification for such an adjournment.

III. The Applicant appeals against the Secretary-General's decision to suspend her from service without pay for one month as a disciplinary measure under staff rule 110.3(b).

The impugned decision results from the finding of the Joint Disciplinary Committee at Geneva that the Applicant had slapped and pushed a colleague and used excessive language, thus committing actions which were obviously incompatible with the responsibility and conduct befitting her status as an international civil servant under staff regulation 1.4. The

Respondent determined that the Applicant's actions constituted misconduct and displayed a behaviour which fell short of the standards of conduct required from international civil servants.

IV. The Tribunal recalls that the United Nations Charter and the Staff Regulations vest in the Secretary-General the authority to determine whether a staff member has met the required standards of conduct. The Secretary-General has broad discretion in exercising his disciplinary authority as regards both the evaluation of the facts and the disciplinary measure to be imposed in specific cases of misconduct.

V. However, as recalled in Judgement No. 515, Khan (1991), paragraph II.2, "... the Tribunal is competent to review the Respondent's decision if it is vitiated by lack of due process or by a mistake of fact or law, or is arbitrary or motivated by prejudice or by other extraneous factors".

VI. The Tribunal notes that there is no dispute between the parties as to the facts as established by the Joint Disciplinary Committee and by the Joint Appeals Board at Geneva.

VII. The Applicant contests the Respondent's decision on a number of grounds. She claims that her right to be heard was not respected; that testimony favourable to her was not taken; that the decision to suspend her during investigation was taken hastily and lightly; that the investigation was delayed and conducted slowly; that the contested decision was disproportionate, which constituted an error of law; that there were attenuating factors in favour of the Applicant; that no attempt at conciliation was made and that suspending the Applicant from service for six months was in itself a serious sanction considering the actions imputed to the Applicant.

VIII. The Tribunal observes that most of those grounds invoked by the Applicant were carefully examined by the Joint Disciplinary Committee and by the Joint Appeals Board. The Board reported thereon as follows:

> "35. ... the Appellant had been properly afforded due process during the entire JDC [Joint Disciplinary Committee] proceedings, since:
>
> (a) she was availed a complete duplicate copy of the JDC case file on 27 June 1988, and was informed of her right to have a counsel, if required;
>
> (b) she was given the right to submit in writing her version of the matter;
>
> (c) she was heard by the JDC on 26 August 1988, and was present during the entire hearing of the representative of UNICEF Administration and other witnesses;
>
> (d) the JDC, a fact-finding body established under staff regulation 10.1 with both administrative and staff participation, determined the facts and unanimously reached its conclusions after having examined the facts as well as the written and oral testimonies by witnesses, including those of the Appellant.
>
> 36. In view of the above considerations, the Panel finds that the Appellant was accorded due process before a decision was reached to suspend her without pay for one month as a disciplinary measure under staff rule 110.3(b). The Panel observed in this connection that the Appellant's claim that the JDC report 'is based on wrong testimonies and unfounded allegations' was not substantiated by any evidence."

IX. After reviewing the work of the Joint Disciplinary Committee and the Joint Appeals Board in this respect, the Tribunal endorses the Board's findings mentioned in the preceding paragraph. The Tribunal will now examine the other contentions of the Applicant.

X. As to the Applicant's contention that the decision to suspend her from duty was taken with undue haste, the Tribunal notes that the decision was taken only after Mrs. Tissot complained to the Administration, which in turn wrote to the Applicant on 28 April 1988 suspending her with full pay during investigation and without prejudice to her rights. The Tribunal finds that the action taken in this regard was in full compliance with the provisions of staff rule 110.4.

XI. The Applicant also contends that the investigation in her case was deliberately slow in order to exert pressure on her so that she would resign her post. The Tribunal is unable to accept this contention as the submission of the Applicant's case to the Joint Disciplinary Committee took only two months, which does not seem to be unreasonable. Moreover, this delay was not prejudical to the Applicant as she was on suspension with full pay.

XII. The Tribunal notes with regret the lack of efforts, on the part of UNICEF, at reconciliation between the Applicant and Mrs. Tissot. However, the Tribunal does not believe that such lack of efforts constitutes a vitiating factor which could amount to denial of due process to the Applicant.

XIII. The Applicant further argues that an error of law was committed because the sanction imposed on her was out of all proportion to the offense, and that the Respondent disregarded attenuating factors, thereby abusing his discretion in disciplinary matters.

XIV. The Tribunal recalls, as it did in Judgement No. 300, Sheye (1982), paragraph IX, "... that it has in its jurisprudence consistently recognized the Secretary-General's authority to take decisions in disciplinary matters, and established its own competence to review such decisions only in certain exceptional

conditions, e.g. in case of failure to accord due process to the affected staff member before reaching a decision".

In the present case, the Tribunal finds that such exceptional conditions do not exist. Therefore, the Tribunal cannot entertain the Applicant's claim for rescission of the Secretary-General's decision on the ground of the severity of the penalty.

XV. Taking into account all the circumstances of the case, the Tribunal holds that the contested decision was not vitiated by any error of fact or of law or by any lack of due process, nor arbitrary or motivated by prejudice or any other extraneous factors, and that the decision constituted therefore a valid exercise of the Secretary-General's discretion in disciplinary matters.

XVI. For the foregoing reasons, the application is rejected.

(Signatures)

Ahmed OSMAN
Vice-President

Ioan VOICU
Member

Luis de POSADAS MONTERO
Member

New York, 7 November 1991

Jean HARDY
Acting Executive Secretary